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FILE: WAC 99 098 50896 Office: CALIFORNIA SERVICE CENTER Date: FEB 3 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner is in the business of designing sound systems and importing and exporting loudspeaker systems and components. It seeks to employ the beneficiary as a trading manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation. The AAO affirmed the director's findings and dismissed the appeal both on the specialty occupation basis and on other grounds that had not been raised earlier, namely: (1) a labor condition application (LCA) that was certified after the petition was filed, in contravention of the regulation at 8 C.F.R. § 214.2 (h)(4)(iii)(B); and (2) failure of the evidence to establish that the beneficiary was qualified to perform services in a specialty occupation in accordance with 8 C.F.R. § 214.2 (h)(4)(iii)(C).

The motion asserts several grounds for its contention that the Citizenship and Immigration Services (CIS) decisions on the specialty occupation issue have been erroneous, arbitrary, capricious, abuses of discretion, and "not based upon substantiated evidence."¹ Counsel also maintains that CIS wrongly substituted its business judgment for the petitioner's soundly based decision about its "practical and legitimate needs" as a growing company in its particular market. Counsel also characterizes the denial and subsequent dismissal of the petition as the result of CIS's unfair and inconsistent application of "the existing regulatory and legal framework regarding the issue of 'specialty occupation.'"

According to counsel, in addition to the petitioner's insistence that its trading manager "must possess a bachelor's degree to successfully operate," there are "numerous indications that attest to the fact that it is a prevailing practice in the business industry that the Trading Manager position or similar positions normally require the applicant to possess the minimum of a bachelor[']s degree." In support of this proposition, counsel cites to a U.S. Bureau of Labor Statistics "survey of the field of management and Administrative positions nationwide," which counsel says, shows, first, that "the typical education or training level" was a bachelor's degree or higher, and, second, that the trend in bachelor's degrees is growing. Counsel also cites to Department of Labor (DOL) documents submitted by the petitioner, to highlight the types of knowledge and courses that are required for management positions, including the trade management position at issue.

Counsel further contends that, contrary to the CIS view, the proffered position "is significantly different and more specialized than that of the normal sales management position," which CIS determined did not qualify as a specialty occupation. Counsel asserts that his contention is clearly supported by the petitioner's description of the duties.

Counsel also asserts that, contrary to case law, it appears that CIS has made the petitioner's relatively small size a material factor in its decision.

¹ Although counsel generally directs its assertions against CIS or the director, and not the AAO, it is clear that the motion is also directed against the AAO's dismissal of the appeal, and it will be so construed.

The motion does not qualify for consideration as a motion to reopen: it does not state or provide documentary support for new facts to be proved. *See* 8 C.F.R. § 103.5(a)(2). The motion, however, should be entertained as a motion for reconsideration under 8 C.F.R. § 103.5(a)(3), as it asserts that the AAO had incorrectly applied law and CIS policy to the evidence of record at the time of its dismissal of the petition.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The motion fails to establish that the AAO misapplied law or CIS policy in its decision on the appeal. In reaching this determination, the AAO considered the entire record, including: (1) the Form I-129 and its supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response, with documentation, to the director's request; (4) the director's denial letter; (5) the matters submitted on appeal; (6) the AAO decision on the appeal; and (7) the motion.

Section 214(i)(b) of the Act, 8 U.S.C. § 1184(i)(b), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to

perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

CIS interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The evidence that was before the AAO about the proffered duties is a critical factor in deciding the merits of the motion. Submitted with the Form I-129 was a one-page document with separate paragraphs describing the petitioner, the duties of and qualifications for the proffered position, and the beneficiary’s qualifications. According to this document, the holder of the position:

Formulates merchandising policies and coordinates merchandising activities in [a] wholesale establishment; [d]etermines mark-up and mark-down percentages necessary to ensure profit based on estimated budget and profit goals[;] directs buyers in purchase of supplies for resale; [and] [c]onsults with other personnel to plan sales promotion programs.

On appeal, a letter from the petitioner’s president added that the beneficiary “will be required to travel to different locations to explain the technical aspects of our component parts and the specifications of our finished products.” The letter also asserted that the position requires “a good understanding of basic concepts in physics and wave theory” in order to understand and explain “highly technical concepts,” such as impedance and frequency response, that relate to the petitioner’s products. A product brochure submitted on appeal provided pictures and the technical specifications of some of the petitioner’s products.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. To the limited extent that they were described in the record, the proposed duties are not identifiable with any position for which a bachelor’s or higher degree, or the equivalent, in a specific specialty is a normal requirement.

Also, the evidence does not refute the AAO’s determination that neither the Department of Labor’s *Occupational Outlook Handbook (Handbook)* nor its *Dictionary of Occupational Titles* indicated that the proffered position requires a bachelor’s degree or higher in a specific specialty.

Contrary to the motion’s contention at page 8, the excerpts the petitioner provided from DOL and its Bureau of Labor Statistics do not indicate “a prevailing practice in the business industry that the Trading Manager position or similar positions normally require the applicant to possess a minimum of a bachelor’s degree.” More to the point, these documents do not establish that the proffered position is one that normally requires a bachelor’s degree or higher in a specific specialty.

Thus, the evidence of record provided the AAO a substantial and reasonable basis for its determination that the trade manager position here does not meet the criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1).

The next criterion for consideration is the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), that is, whether the evidence of record at the time of the appeal established a degree requirement that is common to the industry in parallel positions among similar organizations. On this issue, the AAO’s determination was also correct.

As the AAO noted in its decision on the appeal, the letters that counsel submitted from two other firms opined about the need for a bachelor’s degree, but they did not state a requirement for a bachelor’s degree in a

specific specialty. As indicated earlier in this decision, to qualify a position as a specialty occupation, a bachelor's or higher degree required by a position must be in a specific specialty related to the position.

On the motion, the AAO's review of the 2002-2003 edition of the *Handbook* revealed no basis for finding that the proffered position, as depicted by the evidence of record, belonged to an occupation for which there is an entry requirement of a bachelor's degree or higher in a specific specialty.

As just discussed, the AAO's decision with regard to the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2) was correct.

Likewise, the evidence of record at the time of the appeal justifies the AAO's not finding a specialty occupation under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2) - a particular position is so complex or unique that it can be performed only by an individual with a degree. Again, and as reflected in the language of the AAO's dismissal of the appeal, CIS interprets a specialty occupation "degree" to mean one in a specific specialty. The descriptions of the duties did not establish such complexity or uniqueness, nor did any documentary evidence, including the letters submitted from the other companies.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not at issue. Because this is the first time that the petitioner has offered the position in question, there is no evidence about prior hiring requirements.

Finally, the petitioner's identification and description of the proposed duties do not establish the requisite specialization and complexity for the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) - the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The AAO disagrees with the motion's assertions, at page 14, that the phrase "formulating policy" in the duty description (1) is "prima facie evidence that the occupation in question requires a theoretical and practical application of a body of highly specialized knowledge," and (2) "implies a need for rigorous qualitative and quantitative analytical abilities that only an education leading to a bachelor's degree produce." Furthermore, the record as it was constituted at the time of the appeal lacked evidence to substantiate these assertions. In particular, the evidence of record did not provide meaningful details about the specific tasks that the proposed duties entail. As a result, the evidence did not illuminate any qualitative or quantitative analysis that the duties may require, and the AAO will not speculate about the issue. Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With regard to the president's letter submitted on appeal, it should be noted that the record does not contain any evidence from which the AAO could have reasonably concluded that the technological concepts involved in the petitioner's business would require the beneficiary to theoretically and practically apply a body of highly specialized knowledge that is associated with a bachelor's degree or higher in a specific specialty. A petitioner's conclusions do not suffice. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Therefore, the AAO also correctly applied the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

The AAO also notes that the motion does not address the two other grounds upon which the AAO denied the petition, namely: (1) an untimely certification of the petitioner's labor condition application; and (2) the failure of the evidence of record to establish that the beneficiary is qualified to serve in a specialty occupation. As these grounds are substantiated by the record and not contested on appeal, they shall remain undisturbed as additional grounds for denial of the petition.

The AAO specifically finds that the evidence of record does not substantiate counsel's assertions that the size of the petitioner played a material part in the AAO's decision, and that the AAO wrongly usurped the petitioner's business judgment. Also, counsel's contention that the AAO's decision on the appeal was an unfair and inconsistent application of "the existing regulatory and legal framework regarding the issue of 'specialty occupation'" is unsubstantiated. Likewise, counsel's contention that the AAO's decision was arbitrary, capricious, an abuse of discretion, and not based on the evidence is without merit.

In summary, the AAO's determination on appeal had a substantial basis in the record and did not incorrectly apply law or CIS policy. Accordingly, the AAO shall not disturb the AAO decision on the appeal.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The decision of the AAO is affirmed. The petition is denied.